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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Order 2000-2-12

71907

Issued by the Department of Transportation
on the 7th day of February, 2000

Served: February 8, 2000

1999 U.S.-BRAZIL COMBINATION SERVICE
CASE

Docket OST-99-6284 -36

Application of

CONTINENTAL AIRLINES, INC.

for exemptions pursuant to 49 U.S.C. § 40109
(Houston-Lima-Sao Paulo and Houston-Brazil
Dormancy) and a Peru-Brazil frequency allocation

Docket OST-2000-6759 -15

ORDER DEFINING SCOPE OF PROCEEDING

Summary

By this order we determine that a total of eleven weekly frequencies will be available for allocation in the *1999 U.S.-Brazil Combination Service Case (1999 Brazil Case)*, Docket OST-99-6284. We also address various other matters relating to the scope of the proceeding, certain procedural issues and issues concerning authorities to be held during the pendency of the proceeding.

Background

By Order 99-12-27 the Department addressed petitions for reconsideration filed by American Airlines, Delta, and United Air Lines regarding frequencies held by Continental Airlines for services between Houston and New York (Newark) and Brazil, including the issue of whether some or all of those frequencies should be included for reallocation in the *1999 Brazil Case*.¹ Specifically, the Department rejected requests that all seven of Continental's Houston-Brazil frequencies be revoked and placed at issue in the *1999 Brazil Case* since Continental had begun

¹ See Order 99-12-27 for a discussion of allocation of frequencies to Continental for Brazil services as well as for a chronology of pleadings in the *1999 Brazil Case*.

service in the Houston-Brazil market and had firm plans to operate four of the seven weekly flights. The Department deferred a decision on whether the remaining three frequencies should also be included in the proceeding, pending additional evidence from Continental on its plans to use those frequencies before they would otherwise become dormant under the terms of the frequency award. Absent such evidence, the Department stated that the frequencies should be included in the *1999 Brazil Case*. The order directed Continental to provide by January 7, 2000, evidence (i) of public announcements for use of the three frequencies commencing prior to April 3, 2000, (ii) of schedules for such service in its computer reservation system, and (iii) that it is accepting reservations and sales for such service, or to confirm to the Department that it would not use the frequencies prior to established dormancy date. We provided an opportunity for comments by interested parties on any submission by Continental, requiring answers by January 13 and replies by January 18.

The order also granted Delta a *pendente lite* allocation of the three frequencies effective January 5, 2000 based on Delta's proposed immediate plans to use the frequencies in the Atlanta-Brazil market.

In addition, the order expanded the scope of the proceeding to include one frequency previously allocated to Continental for Newark-Rio de Janeiro service that had become dormant and automatically reverted to the Department.

Continental's Submissions

On January 7, 2000, Continental responded to the Department's directive and contemporaneously filed two exemption applications relating to its Brazil service.

With respect to Houston, Continental states that it does not have firm plans to use the three frequencies at issue before April 3, the date on which they would become dormant under the terms of the award. Continental states that its aircraft schedules are committed through June 14 and, therefore, Continental cannot institute service with the frequencies by April 3. However, Continental states that it would use the frequencies beginning June 15, 2000, operating the flights on a Houston-Lima-Sao Paulo routing with B-757 aircraft. Continental states that its proposal of four nonstop and three one-stop flights in the Houston market will enable it to introduce the first U.S.-flag nonstop Lima-Sao Paulo flights and to compete with American for intra South America passengers and U.S.-South America passengers with multiple destination itineraries. Based on this proposal, Continental requests that we waive the dormancy condition applicable to these frequencies and permit Continental to retain the three Houston-Sao Paulo frequencies without further procedures. Continental argues that waiver of the dormancy condition for a period of fewer than 90 days is justified.² Should the Department not grant its request, Continental urges the Department to award the three frequencies to Continental on a *pendente lite* basis for services

² In order to implement its proposal, Continental concurrently filed an application for allocation of three Peru-Brazil fifth freedom frequencies. (Docket OST-2000-6759). By notice dated January 11, 2000, the Department shortened the period for filing answers to this application to January 13, the same date that answers to Continental's response to the Department's directive in Order 99-12-27 were due.

beginning June 15, rather than permitting Delta to use the flights on a *pendente lite* basis as authorized by Order 99-12-27.

In its January 7 response, Continental also requested that the Department reconsider its decision to place Continental's dormant Newark-Brazil frequency at issue in the *1999 Brazil Case*. Continental maintains that it has firm plans to use the frequency between January 7 and February 23 for the seasonal peak period and to offer year-round daily New York/Newark-Rio de Janeiro-Belo Horizonte service effective September 12, 2000.³ Continental states that it has begun ticketing passengers on daily New York/Newark-Rio de Janeiro flights pursuant to the *pendente lite* award granted in Order 99-12-27 and will begin ticketing Belo Horizonte service as soon as the Department grants such authority. Continental further states that with the added support of the Belo Horizonte traffic, it is confident that it can operate the Newark-Rio de Janeiro service. In these circumstances, Continental maintains that it should be permitted to retain the Newark frequency.

With respect to both the Houston and Newark frequencies, Continental maintains that the Department has waived the dormancy requirements to permit an airline to retain its frequencies and argues that that principle should be applied to permit Continental to keep its one weekly Newark-Brazil frequency and its three Houston-Brazil frequencies. Should the Department decide otherwise, however, Continental applies for one U.S.-Brazil frequency to continue its daily Newark-Rio de Janeiro flights (and extension to Belo Horizonte) effective September 12, 2000, and for three frequencies for operation of three weekly Houston-Lima-Sao Paulo flights for consideration in the *1999 Brazil Case*.

Responsive Pleadings

American, Delta, United, and the Regional Business Partnership (Newark) filed answers to Continental's submissions.⁴ American, the Georgia and Atlanta Parties, the City of Houston and the Greater Houston Partnership (Houston parties), and Continental filed replies.⁵ Delta filed a surreply; United filed a consolidated response; Continental filed a response to Delta's surreply; and Delta filed a rejoinder.⁶

American, Delta, and United oppose Continental's requests to retain its frequencies. American and United argue that the one Newark frequency was dormant, had reverted to the Department, has already been placed at issue in the *1999 Brazil Case*, and should remain at issue in the

³ Concurrently with its January 7 response, Continental filed an application for exemption authority to serve the New York/Newark Belo Horizonte market on its Newark-Rio services. Docket OST-2000-6760. On January 24, 2000, we granted Continental's uncontested application. Continental's exemption request was not dependent on its request for reconsideration of our decision in Order 99-12-27 with respect to its dormant Newark-Brazil frequency.

⁴ Delta and United submitted consolidated answers. American submitted a motion for leave to file late and incorporated its answer in OST-99-6284 into that filed in response to OST-2000-6759. We will grant the motion.

⁵ The Georgia and Atlanta Parties consist of the State of Georgia, the City of Atlanta, Hartsfield International Airport, and the Metro Atlanta Chamber of Commerce. The Houston Parties' reply was accompanied by a motion for leave to file an unauthorized document. We will grant the motion.

⁶ Delta's surreply, the responses of United and Continental, and Delta's rejoinder were each accompanied by a motion for leave to file an otherwise unauthorized document. We will grant the motions.

proceeding. American argues that Continental is trying to short circuit comparative procedures in which the Department would determine how the one frequency can best be used to serve the public.

American and United also argue that Continental's response reveals and confirms that Continental has no plans to use the three Houston frequencies prior to April 3 and further indicates that when Continental does plan to use the frequencies, it will do so in a manner that is far outside the scope of its original proposal (one-stop rather than nonstop and with smaller aircraft) and contrary to the basis on which the Department allocated the flights to Continental. American and United, therefore, urge the Department to reconsider its decision in Order 99-12-27 to place only three of Continental's seven Houston frequencies in the *1999 Brazil Case*, and instead, should place all seven of the Houston frequencies into the case.

Delta similarly argues that Continental has not made the required showing to warrant retaining its three Houston frequencies. Unlike American and United, however, Delta does not support including allocation of the three Houston frequencies in the *1999 Brazil Case*, arguing that the question of which carrier should be allocated the flights is unrelated to the service and competitive issues in the *1999 Brazil Case*. Instead, Delta urges the Department to award the three frequencies to Delta on a permanent basis without further procedures. Delta states that it would use the frequencies to operate nonstop Atlanta-Rio service beginning June 1, 2000 with B-767-300 aircraft. It maintains that, other than Continental, it is the only carrier applicant seeking fewer than seven weekly frequencies, and that its nonstop Atlanta proposal is clearly superior to Continental's one-stop Houston proposal. In these circumstances, Delta maintains that the Department should allocate the three frequencies to Delta now without further procedures. However, should the Department determine that further procedures are necessary, Delta argues that the Department should establish a separate, abbreviated show-cause proceeding to allocate the flights.⁷

In its reply, Continental agrees with Delta that reaching a prompt decision on the permanent allocation of the Houston frequencies outweighs the benefits of considering those frequencies in a route proceeding, but it urges the Department to allocate the frequencies to Continental, not Delta. Should the Department nonetheless determine that further procedures are necessary, Continental opposes Delta's proposal that the Department establish a separate proceeding for consideration of the three frequencies, arguing that there is no merit to holding two separate proceedings on Brazil frequencies at the same time. Continental further argues that Delta has failed to recognize that it automatically loses its *pendente lite* allocation of the frequencies for Atlanta-Brazil service granted in Order 99-12-27 if Delta has not inaugurated service by April 5; that Delta, therefore, has defaulted on its Atlanta award and allowed the frequencies to lapse into dormancy; and that Delta must apply for an exemption from the dormancy condition in order to operate its proposed services starting June 1. Since Delta has not requested such a dormancy waiver, Continental maintains that it is the only applicant for the three frequencies and it urges the Department to permit it to retain the frequencies.

⁷ Delta does not seek allocation of Continental's one Newark frequency, but argues that the Department should put Continental on notice that the frequency is subject to immediate and permanent reallocation if Continental fails to use the frequency fully for 90 days.

American also opposes Delta's request, arguing that Delta should compete for the frequencies in a comparative proceeding.

Similarly, United opposes any result that would exclude the four Continental frequencies from consideration in the *1999 Brazil Case*. Contrary to the positions of Delta and Continental, United states that its acquiescence to *pendente lite* allocation of the frequencies should not be interpreted as a lack of interest by United in these frequencies on a long-term basis. United states that the Department should retain the maximum flexibility to allocate the available frequencies in a manner that achieves the greatest combination of competitive benefits, and the Department should not entertain the belated proposals of Continental and Delta to reconsider the established procedures in Order 99-12-27. United states that the applications of United for seven frequencies each, Delta for ten frequencies and Continental for four frequencies are mutually exclusive and by law the Department must consider the various requests for long-term allocation in a contemporaneous comparative proceeding that will consider fairly all competing applications. United further notes that Delta has begun selling Atlanta-Rio nonstop services that would require the use of the potentially dormant frequencies and that Delta has failed to request the dormancy waiver necessary to retain those frequencies.

In its rejoinder, Delta maintains that notwithstanding United's comments, United has previously stated that it has no present use for a less-than-daily U.S.-Brazil service pattern and its comments should not persuade the Department to place the Houston frequencies into the *1999 Brazil Case*. Delta urges the Department to require United to state for the record the minimum number of frequencies that the carrier would accept for its Los Angeles service before deciding whether to place the frequencies at issue. Delta further contends that it has not violated the dormancy condition on its *pendente lite* award, arguing that June 1 was the first readily available aircraft opportunity and that it is considering launching nonstop service during the February Carnival season. Delta contends that if a dormancy waiver is required, it will timely file such a request with the Department.

Newark supports Continental's plan to resume daily year-round Newark-Rio de Janeiro service and urges the Department to permit Continental to retain, without further consideration, the one Newark frequency that Order 99-12-27 placed at issue in the *1999 Brazil Case*.

The Georgia and Atlanta Parties support Delta's Atlanta-Rio de Janeiro proposal and urge the Department to take immediate action to make final the temporary award of the frequencies for Delta's Atlanta-Brazil service. They maintain that a route case is not necessary to recognize the superior public benefits of Delta's proposal.

The Houston Parties support Continental's proposal to retain its Houston frequencies without further procedures, arguing that Continental has a plan for South America service from the Houston gateway and should be permitted to implement that plan.

Decision

After full consideration of all of the pleadings on this matter, we have determined that a total of eleven weekly frequencies will be available for allocation in the *1999 Brazil Case*. These include the following: the original seven frequencies placed in issue by Order 99-9-23 (those previously allocated to American for New York-Rio de Janeiro service); one frequency placed in issue by Order 99-12-27 (previously allocated to Continental for Newark-Rio de Janeiro service); and three frequencies being placed in issue by this order (previously allocated to Continental for Houston-Sao Paulo service). We have also decided to rescind the *pendente lite* allocation of frequencies granted Delta in Order 99-12-27.

In instituting the *1999 Brazil Case* we stated that one of our main objectives would be to consider the long-term needs of the Brazil market. We stated that the frequencies at issue were valuable traffic rights obtained in exchange for granting Brazil route opportunities for its airlines to serve the United States and that the public interest clearly called for use of the rights.

At the time, we placed at issue seven weekly frequencies previously allocated to American. By Order 99-12-27, we expanded the scope of the proceeding to include allocation of one Newark-Rio frequency previously allocated to Continental that had become dormant and reverted to the Department.

We also stated that we would expand the scope of the proceeding further to include three frequencies allocated to Continental for Houston-Brazil service if Continental did not present firm evidence as directed by the Department that it would use the flights by April 3, the date that the frequencies automatically would revert to the Department under the terms of the award.

It is clear from Continental's response to Order 99-12-27 that it is not prepared to use the frequencies before the April 3 dormancy date applicable to the frequencies. We, therefore, have determined that those frequencies should be included for allocation in the *1999 Brazil Case*.

As a corollary, we have determined not to award immediately the three Houston frequencies to Delta for its proposed Atlanta-Rio de Janeiro service. Both Delta and Continental have proposed to use the three subject frequencies beginning in June 2000. As these proposals are mutually exclusive, we are required to afford them comparative consideration. Moreover, contrary to Delta's allegations, at least one other eligible airline has expressed interest in using the frequencies on a long-term basis. Having concluded that the three frequencies require consideration in a proceeding, we have also determined that the proper proceeding is the *1999 Brazil Case* and not a separate proceeding. We have instituted the *1999 Brazil Case* for consideration of the long-term needs of the U.S.-Brazil market. The inclusion of the Houston frequencies in that proceeding is fully consistent with purpose of that case and comparable to other similar proceedings handled by the Department.⁸ A separate proceeding would be duplicative, unnecessarily burdensome on the parties and the Department, and not an economical use of the Department's resources. The Department's efforts in this regard are better used in considering all of the frequencies in one proceeding.

⁸ See, e.g., the *1998 U.S.-Brazil Combination Service Case*, Docket 98-3863, and the *U.S.-China Air Services Case (2001)*, Docket OST-99-6323.

We are also unpersuaded by the renewed arguments of American and United that we place all seven of the Houston frequencies at issue in the *1999 Brazil Case*. We fully addressed this issue in Order 99-12-27. Order at 4-5. American and United have presented no new evidence or arguments that persuade us to alter our decision. As we noted in Order 99-12-27, our award to Continental contemplated circumstances under which some of Continental's frequencies would become available should Continental not use all of its allocated frequencies. Thus, there is no basis to conclude that Continental's failure to use all of its frequencies should subject its award to complete forfeiture.

Finally, Continental has argued that the Department should (i) consider whether American should retain seven frequencies that it is moving from the Miami-Sao Paulo route to Dallas/Ft. Worth and Orlando in April 2000, and (ii) review American's use of its Brazil frequencies throughout 1999 to determine whether other frequencies held by American should be made available for reallocation. American opposes Continental requests, arguing that Continental has presented no basis for the Department to take such actions.

We are not persuaded that a review of American's frequencies is warranted. As we have stated in previous orders, a large number of U.S.-Brazil frequencies held by American are not city specific, and, thus, American is free to move those frequencies to other markets without additional authorization from the Department. As to American's use of its frequencies, there is no evidence that American has not used its frequencies in a manner consistent with the dormancy provisions of those awards. Indeed, a review of the Information Responses already filed in the *1999 Brazil Case* reveals that there was no consecutive 90-day period during which American was not using its allocated flights. We, therefore, are unpersuaded that any additional frequencies now allocated to American should be placed at issue in the *1999 Brazil Case*.

Continental's New York Frequency

Continental has sought reconsideration of our decision in Order 99-12-27 to place its one dormant Newark frequency at issue in the *1999 Brazil Case* and urges us to award the frequency to Continental on a permanent basis without further procedures. Continental argues that it has maintained the majority of its service in the Newark-Rio de Janeiro market while other airlines abandoned the market, and states that it has firm plans to use the frequency on a year-round daily basis beginning September 12, 2000. Newark supports Continental's request. United and American oppose it.

We are not persuaded by Continental's arguments to rescind our decision in Order 99-12-27. The frequency allocated to Continental became dormant and reverted automatically to the Department. While Continental has presented one proposal to use the frequency, the pleadings in response to Order 99-12-27 suggest that other eligible carriers also may have plans to use this frequency. In these circumstances, we believe the public interest is best served by including allocation of this frequency in the *1999 Brazil Case*, affording all parties an opportunity to offer proposals. Continental has filed a contingent application for allocation of this frequency and will be free to prosecute that application in the proceeding. In the meantime, Continental continues to be authorized to use this frequency under the *pendente lite* award granted in Order 99-12-27.

Miscellaneous Evidentiary and Procedural Issues

In Order 99-12-27, the Department updated the traffic data available to parties in preparing their direct exhibits to include data for the 12 months ended June 30, 1999. As a result of the updated traffic data available, the base year for traffic forecasting purposes as prescribed by Order 99-12-27 should also be the 12 months ended June 30, 1999. We inadvertently did not reflect that change in Order 99-12-27. We orally notified all carrier applicants of this clarification on January 21, 2000, and confirm this modification to the evidence request here.

In addition, in Order 99-12-27 we noted that the U.S.-Brazil agreement authorizes services beyond Brazil to other countries in South America and we stated our intent to authorize such services in the *1999 Brazil Case* to the extent consistent with the aviation agreements between the United States and those countries. At the request of one of the applicant carriers, we expanded the historic traffic data available to the parties to include data between the United States and those authorized beyond markets. Continental has now proposed to serve Brazil via Lima, Peru. Since such services are also consistent with both the U.S.-Brazil and U.S.-Peru aviation agreements, we believe it would benefit the parties to the proceeding if we also release traffic data relevant to the U.S.-Peru market.

As a result of our decision in this order to expand the scope of this proceeding to include four additional weekly frequencies, and based on the pleadings in response to Order 99-12-27, the carriers eligible for allocation of the available frequencies may want to supplement their current applications or to file new applications in the *1999 Brazil Case*. Therefore, we will provide all four of the carriers eligible for allocation of the available frequencies a further opportunity to file applications for the frequencies now at issue in this proceeding. Such applications should be filed within three business days of the date of service of this order and should specify the number of additional frequencies sought, the markets to be served, the aircraft to be used, and the startup date for the proposed services.

In this regard, we note that Continental was not an original applicant in the proceeding. In its response to Order 99-12-27, the carrier filed contingent applications for allocation of the four additional frequencies in the event the Department determined that the four frequencies should be at issue in the *1999 Brazil Case*. Continental also sought the related exemption and frequency allocations necessary for its proposed services (Docket OST-2000-6759). Should Continental want to pursue those requests, it should file a motion to consolidate its application in Docket OST-2000-6759 into the *1999 Brazil Case* on the same date that supplemental and new applications are to be filed.⁹ Since parties will have an opportunity to express their comments and arguments at the Direct Exhibit, Rebuttal Exhibit and Brief stages of the proceeding, we will not entertain answers or replies to any supplemented or new applications or motions.

Finally, we had originally proposed to issue our decision on the final scope of the *1999 Brazil Case* by January 25, 2000. The remaining procedural dates in the case were based on that

⁹ Based on our decisions in this case, we deny Continental's request in Docket OST-2000-6759 to the extent that it seeks exemption from the dormancy condition on its nonstop Houston-Sao Paulo frequencies. Continental may seek consolidation of the balance of its application in that docket into the *1999 Brazil Case*.

scoping date. As we were unable to issue our decision by the established date, we will extend the related procedural dates establish in Order 99-12-27 as follows: Supplemental DOT Information Responses will be issued February 8, 2000; Direct Exhibits will be due March 2, 2000; Rebuttal Exhibits will be due March 23, 2000; and Briefs will be due April 13, 2000.

Delta's Pendente Lite Frequency Allocation

In Order 99-12-27, we granted Delta *pendente lite* authority effective January 5, 2000, to use the three Houston frequencies for services between Atlanta and Brazil based on Delta's representations that it would use those frequencies immediately. Indeed, footnote 11 of that order indicates that the dormancy period applicable to those frequencies would begin on January 5, 2000. Delta in its pleadings before us has now indicated that it has no firm plans to use the frequencies until June 1, 2000.¹⁰ As neither Delta nor any other carrier has demonstrated immediate plans to use the frequencies, we no longer conclude that a *pendente lite* award in this case is warranted. We believe that the public interest is best served if we concentrate our efforts toward completing the long-term proceeding for allocation of the eleven frequencies at issue. We, therefore, rescind the *pendente lite* frequency allocation awarded to Delta in Order 99-12-27.

ACCORDINGLY,

1. We determine that a total of eleven weekly U.S.-Brazil frequencies will be available for allocation in the *1999 Brazil Case*, Docket OST-99-6284;
2. We invite the four U.S. designated carriers to supplement existing applications, file new applications, or move to consolidate previously filed applications into the *1999 Brazil Case* as amended by this order. Such applications/motions should be filed no later than three business days from the date of service of this order;
3. Effective immediately, we rescind the *pendente lite* frequency allocation granted Delta Air Lines by Order 99-12-27;
4. We deny the requests of Continental Airlines in Dockets OST-2000-6759 and OST-99-6284 to the extent that it seeks a waiver of the dormancy condition applicable to its three Houston-Sao Paulo frequencies awarded by Order 99-3-26;
5. We deny the requests of American Airlines and United Air Lines that we reconsider our decision in Order 99-12-27 not to place all seven of Continental's Houston-Sao Paulo frequencies at issue in the *1999 Brazil Case*;

¹⁰ We take note of Delta's statement in its January 24, 2000, rejoinder that it is considering earlier implementation "scenarios." However, we do not view the speculative nature of Delta's submission, particularly when viewed against the background of Delta's earlier pleadings (including a Delta press release expressly stating a June 1 startup date, attached to Delta's January 20, 2000 submission), as fulfilling the original premise for the *pendente lite* award.

6. We deny the request of Continental Airlines for reconsideration of our decision in Order 99-12-27 to include Continental's one dormant Newark frequency for allocation in the *1999 Brazil Case*;

7. We deny the request of Continental Airlines for reconsideration of the frequency allocations to American Airlines for U.S.-Brazil services;

8. We amend the Evidence Request appended to Order 99-9-23 to:

(a) change the prescribed base year for traffic forecasting purposes to the 12 months ended June 30, 1999; and

(b) add a new section (f) as follows: (f) For the 12 months ended June 30, 1999, O&D traffic from the Department's O&D Survey, between all U.S. points, on the one hand, and Lima, Peru, on the other;

9. We amend the procedural schedule for submissions in the *1999 Brazil Case* as follows:

Supplemental DOT Information Responses:	February 8 , 2000
Direct Exhibits	March 2, 2000
Rebuttal Exhibits	March 23, 2000
Briefs to the DOT Decisionmaker	April 13, 2000;

10. We grant all motions for leave to file late or to file otherwise unauthorized documents in the captioned dockets; and

11. We will serve this order on American Airlines, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., United Air Lines, Inc., the Houston Parties; the New York Parties, the City of Los Angeles, the Regional Business Partnership (Newark), the Georgia and Atlanta Parties, the Ambassador of Brazil in Washington, D.C., the U.S. Department of State (Office of Aviation Negotiations), and the Federal Aviation Administration.

By:

A. BRADLEY MIMS
Deputy Assistant Secretary for
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(SEAL)

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